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11
12 IN THE UNITED STATES BANKRUPTCY COURT
13 FOR THE EASTERN DISTRICT OF CALIFORNIA
14 (Modesto Division)
15

16 In re:) Case No: 09-90452-E-7
17 DeLiddo & Associates, Inc.,) Chapter 7 Case
18 dba Deers,)
19 P.O. Box 187)
20 Salida, CA 95368)
21 Tax ID/EIN 77-0444959)
22 Debtor.)
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23 Stephen C. Ferlmann, Trustee) Adv. Proc. No. 11-09017
24 Plaintiff,) D.C. No. CWC-1
25 vs.)
26 Jack P. DeLiddo,) Date: December 7, 2011
27 Defendant.) Time: 10:30 a.m.
) Place: Modesto Courtroom
) Department E

28 **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

29 To: The Honorable Ronald H. Sargis, U.S. Bankruptcy Judge:

30 Stephen C. Ferlmann, Plaintiff/Trustee herein, pursuant to
31 Federal Rules of Bankruptcy Procedure 7036, 7056 and Local Rule
32 of Practice 7056-1 moves the Court for summary judgment against
33 Defendant, Jack P. DeLiddo, and requests that this Court render

1 judgment for the Plaintiff for all of the relief set forth in
2 Plaintiff's Complaint To Recover Avoidable Transfers (11 U.S.C.
3 §§ 544, 547, 548, 549 and 550 and California Civil Code §§
4 3429.04 and 3439.05).

5 **GROUND FOR RELIEF**

6 1. The Court has jurisdiction over this Motion pursuant to
7 28 U.S.C. §§ 157 and 1334.

8 2. The Plaintiff is entitled to summary judgment because,
9 as more fully shown in the Declarations of Carl W. Collins and
10 Melissa Morena, there is no genuine issue of material fact that
11 needs to be tried in this adversary proceeding:

12 (a) This motion arises under 11 U.S.C. §§ 544, 547, 548,
13 549 and 550 and California Civil Code §§ 3429.04 and 3439.05
14 to avoid and recover preferential, fraudulent and
15 unauthorized transfers in the amount of \$1,737,795.77 made
16 by the Debtor to the Defendant, as an insider, within one
17 year prior to the commencement of the case on February 24,
18 2009; and

19 (b) Defendant has failed to respond to Plaintiff's Request
20 for Admissions Set No. 1 which was served by first class
21 mail on Defendant, by and through his counsel of record, on
22 July 21, 2011, thus admitting all the elements of the
23 preferential, fraudulent and unauthorized transfers and
24 admitting facts which bar all Defendant's claimed
25 affirmative defenses.

26 3. Plaintiff is entitled to summary judgment against
27 Defendant pursuant to Federal Rules of Civil Procedure 36 and 56
28 as made applicable by Federal Rules of Bankruptcy Procedure 7036

1 and 7056. Rules 7036 and 7056 provide that requests for
2 admissions are deemed admitted unless they are denied within 30
3 days after service of the request. Further, any matter admitted
4 under Federal Rule of Civil Procedure 36 is "conclusively
5 established unless the court on motion permits withdrawal or
6 amendment of the admission." By failing to respond to
7 Plaintiff's Request for Admissions Set No. 1, Defendant has
8 admitted that the transfers which are the subject of this
9 adversary proceeding were in fact preferential, fraudulent and
10 unauthorized and has admitted facts which bar any affirmative
11 defenses raised in Defendant's Answer.

12 **STATEMENT OF UNDISPUTED FACTS**

13 4. Plaintiff commenced an adversary proceeding against
14 Defendant on February 18, 2011, to recover avoidable transfers
15 made by Debtor to Defendant by filing and serving the Summons and
16 Complaint on Defendant by first class U.S. Mail on March 1, 2011.

17 5. On or about April 7, 2011, Defendant's counsel requested
18 an extension of time to respond to the Complaint, which was
19 granted by Plaintiff's counsel.

20 6. On May 10, 2011, Defendant filed an Answer to the
21 Plaintiff's Complaint denying the substantive allegations of the
22 Complaint and raising the following affirmative defenses: 1) that
23 the complaint failed to state a claim upon which relief could be
24 granted, 2) that the complaint failed to comply with Federal Rule
25 of Civil Procedure 19(a)(1) in that required parties had not been
26 joined, and 3) any transfers from the Debtor to the Defendant
27 were for contemporaneous exchange or new value and not on account
28 antecedent debts.

1 7. On May 19, 2009, Defendant was served by mail, through
2 his counsel, with Plaintiff's Request for Admissions Set No. 1.
3 (Documents No. 22 and 23).

4 8. Prior to bringing this Motion, Plaintiff's attorney,
5 Carl W. Collins, contacted Defendant's attorney, David C.
6 Johnston, by letter dated September 13, 2011, seeking to have the
7 Defendant either seek relief from the deemed admissions or to
8 stipulate that the matters set out in Plaintiff's Request for
9 Admissions Set No. 1 were admitted by Defendant. A copy of the
10 letter is annexed to the List of Exhibits filed concurrently
11 herewith.

12 9. To date, Defendant has not filed a response to
13 Plaintiff's Request for Admissions Set No. 1 within the time
14 allowed under Federal Rule of Bankruptcy Procedure 7036 or moved
15 for withdrawal or amendment of the resulting deemed admissions.

16 **STATEMENT OF UNDISPUTED FACTS**

17 10. Based upon the deemed admissions, Defendant, Jack P.
18 DeLiddo, has admitted the following facts:

19 a. that each of the payments the Debtor made by the
20 check(s) or electronic funds transfers identified in Exhibit "A"
21 to Plaintiff's Complaint totaling \$108,831.27 constitutes a
22 transfer from Debtor to Defendant;

23 b. that each of the payments the Debtor made by the
24 check(s) or electronic funds transfers identified in Exhibit "A"
25 to Plaintiff's Complaint constitutes a transfer of an interest in
26 property of the Debtor;

27 c. that Defendant was a creditor of the Debtor at the time
28 the transfers identified in Exhibit "A" to Plaintiff's Complaint
were made to Defendant;

1 d. that each of the payments the Debtor made by the
2 check(s) or electronic funds transfers identified in Exhibit "A"
3 to Plaintiff's Complaint was a transfer of an interest in
4 property of the Debtor made to Defendant or for the benefit of
5 Defendant;

6 e. that the transfers identified in Exhibit "A" to
7 Plaintiff's Complaint were made for or on account of an
8 antecedent debt the Debtor owed to Defendant at the time the
9 transfers identified in Exhibit "A" to Plaintiff's Complaint were
10 made;

11 f. that each of the transfers identified in Exhibit "A" to
12 Plaintiff's Complaint were made while the Debtor was insolvent;

13 g. that each of the transfers identified in Exhibit "A" to
14 Plaintiff's Complaint were made within one (1) year prior to the
15 commencement of the Chapter 7 case;

16 h. that Defendant is and at all relevant times was an
17 officer, director, and the majority shareholder of the Debtor;

18 i. that the transfers identified in Exhibit "A" to
19 Plaintiff's Complaint enabled Defendant to receive more than
20 Defendant would otherwise have received in this Chapter 7 case;

21 j. that the transfers identified in Exhibit "A" to
22 Plaintiff's Complaint enabled Defendant to receive more than
23 Defendant would otherwise have received if the transfers had not
24 been made;

25 k. that the transfers identified in Exhibit "A" to
26 Plaintiff's Complaint enabled Defendant to receive more than
27 Defendant would otherwise have received if Defendant received
28 payment on account of the debt(s) to the extent provided by
provisions of Title 11, United States Code;

1 l. that the transfers identified in Exhibit "A" to
2 Plaintiff's Complaint were not intended by the Debtor and
3 Defendant to be a contemporaneous exchange for new value given to
4 the Debtor;

5 m. that the transfers identified in Exhibit "A" to
6 Plaintiff's Complaint were not in fact substantially
7 contemporaneous exchanges;

8 n. that Defendant did not give new value to or for the
9 benefit of the Debtor after the date Defendant received any of
10 the transfers identified in Exhibit "A" to Plaintiff's Complaint;

11 o. that each of the transfers identified in Exhibit "A" to
12 Plaintiff's Complaint was not made in payment of a debt incurred
13 by the Debtor in the ordinary course of business or financial
14 affairs of the Debtor and Defendant;

15 p. that each of the transfers identified in Exhibits "A" to
16 Plaintiff's Complaint was not made in the ordinary course of
17 business or financial affairs of the Debtor and Defendant;

18 q. that each of the transfers Identified in Exhibit "A" to
19 Plaintiff's Complaint was not made according to ordinary business
20 terms;

21 r. that Defendant received the cash or cash equivalent from
22 the transfers made by the checks identified in Exhibits "A" to
23 Plaintiff's Complaint;

24 s. that there is no witness who can testify in support of
25 the allegations and contentions set forth in the each of the four
26 Affirmative Defenses stated in the Defendant's Answer;

27 t. that Defendant has not documentary evidence to support
28 the allegations and contentions set forth in the four Affirmative
Defenses stated in the Defendant's Answer;

1 u. that Defendant was the "initial transferee" of the
2 transfers identified in Exhibit "A" to Plaintiff's Complaint;

3 v. that Defendant was the entity for whose benefit the
4 transfers identified in Exhibits "A" to Plaintiff's Complaint
5 were made;

6 w. that Defendant was the "immediate" or "mediate
7 transferee" of the initial transferee of the transfers identified
8 in Exhibit "A" to Plaintiff's Complaint;

9 x. that Defendant negotiated and deposited into Defendant's
10 bank account the transfers identified in Exhibit "A" to
11 Plaintiff's Complaint or the cash or cash equivalent;

12 y. that Defendant is not a secured creditor of the Debtor;

13 z. that Defendant does not hold a lien or security interest
14 in any asset of the Debtor;

15 aa. that each of the assignments of the notes receivable
16 the Debtor made to Defendant identified in Exhibit "B" to
17 Plaintiff's Complaint constitutes a transfer from Debtor to the
18 Defendant;

19 bb. that each of the assignments of notes receivable the
20 Debtor made to Defendant identified in Exhibit "B" to Plaintiff's
21 Complaint constitutes a transfer of an interest of the Debtor in
22 property;

23 cc. that each of the assignments of notes receivable the
24 Debtor made to Defendant identified in Exhibit "B" to Plaintiff's
25 Complaint was a transfer of an interest in property of the Debtor
26 to Defendant or for the benefit of Defendant;

27 dd. that Defendant was the "initial transferee" of each of
28 the assignments of notes receivable the Debtor made to Defendant
as identified in Exhibit "B" to Plaintiff's Complaint

1 ee. that Defendant was the "immediate" or "mediate
2 transferee" of the initial transferee of each of the assignments
3 of notes receivable the Debtor made to Defendant as identified in
4 Exhibit "B" to Plaintiff's Complaint;

5 ff. that Debtor was insolvent on the date of each of the
6 assignments of notes receivable the Debtor made as identified in
7 Exhibit "B" to Plaintiff's Complaint;

8 gg. that Defendant did not have a lien against property of
9 the Debtor at the time of each of the assignments of notes
10 receivable the Debtor made to Defendant as identified in Exhibit
11 "B" to Plaintiff's Complaint;

12 hh. that each of the assignments of notes receivable the
13 Debtor made to Defendant as identified in Exhibit "B" To
14 Plaintiff's Complaint was made with actual intent to hinder,
15 delay, or defraud the Debtor's creditors;

16 ii. that each of the assignments of notes receivable the
17 Debtor made to Defendant as identified in Exhibit "B" to
18 Plaintiff's Complaint was made without the Debtor receiving a
19 reasonably equivalent value in exchange;

20 jj. that at the time that each of the assignment of notes
21 receivable the Debtor made to Defendant as identified in Exhibit
22 "B" to Plaintiff's Complaint was made that Defendant knew that
23 the Debtor would not have sufficient funds with which to pay all
24 of its creditors;

25 kk. that Defendant received each of the assignments of
26 notes receivable the Debtor made to Defendant as identified in
27 Exhibit "B" to Plaintiff's Complaint for Defendant's own personal
28 use and benefit;

11. that Defendant's acts relating to each of the assignments of notes receivable the Debtor made to Defendant as identified in Exhibit "B" to Plaintiff's Complaint were done intentionally, maliciously, fraudulently, and/or oppressively, with a willful and conscious oppression, fraud, or malice;

mm. that Defendant fraudulently authorized each of the assignments of notes receivable the Debtor made to Defendant as identified in Exhibit "B" to Plaintiff's Complaint for Defendant's own benefit, which funds were entrusted to Defendant's care by virtue of Defendant's position of employment with the Debtor;

nn. that the Debtor made the assignments of notes receivable to Defendant as identified in Exhibit "B" to Plaintiff's Complaint after the commencement of the Debtor's bankruptcy case; and


oo. that each of the assignments of notes receivable the Debtor made to Defendant as identified in Exhibit "B" to Plaintiff's Complaint were made without the Debtor obtaining authorization from the Bankruptcy Court.

11. Defendant is indebted to Plaintiff in the amount of \$1,737,795.77, together with interest at the statutory rate from the date of the filing of this Complaint on February 18, 2011 until paid plus costs in the amount of \$250.00 for an adversary proceeding filing fee.

12. On these undisputed facts, Plaintiff has established each of the elements of an avoidable preference, fraudulent and unauthorized transfers. There are no issues as to any material fact, and Plaintiff is entitled to summary judgment as a matter of law.

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Dated: 10-19-41

Law Office of Carl W. Collins


Carl W. Collins
Attorney for Plaintiff
Stephen C. Ferlmann, Trustee